86 - 1062

No.____

IN THE
SUPREME COURT OF THE UNITED STATES

Term, 19

DOROTHY E. DREYER,
Petitioner

v.

ARCO CHEMICAL COMPANY
A DIVISION OF,
ATLANTIC RICHFIELD COMPANY,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTION PRESENTED FOR REVIEW

1. Did the Third Circuit Court of Appeals err in requiring that an Age Discrimination In Employment Act plaintiff prove that the conduct of the employer was "outrageous" in order to be entitled to an award of liquidated damages?

PARTIES TO THIS PROCEEDING IN THE COURT BELOW

This action, as filed in the United States Court of Appeals for the Third Circuit, was styled *Dorothy E. Dreyer and Naomi D. Strayer, Appellees v. ARCO Chemical Company, a division of Atlantic Richfield Company, Appellant,* at No. 85-3476.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—*(Continued)*

Statutes: Page

OPINION BELOW

The United States Court of Appeals for the Third Circuit issued an Opinion and Order on September 22, 1986. The Opinion, written by Circuit Judge Sloviter, is published in 801 F.2d. 651. No opinion was rendered by the United States District Court for the Western District of Pennsylvania.

STATEMENT OF JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1), wherein it is provided, *inter alia*, that cases in the Courts of Appeals may be reviewed by the Supreme Court by Writ of Certiorari granted upon the Petition of any party to any civil or criminal case before or after rendition of judgment or decree.

Petitioner, Dorothy E. Dreyer, seeks review of that portion of the Order issued and entered by the United States Court of Appeals for the Third Circuit on September 22, 1986, which reverses the jury's finding of a willful violation of the Age Discrimination In Employment Act, and the award to Dreyer of liquidated damages as provided in the Act.

STATUTES INVOLVED IN THIS CASE
TITLE 29, LABOR
SECTIONS 621, 623 and 626

§621. Congressional statement of findings and purpose

(a) The Congress hereby finds and declares that—

(1) In the face of rising productivity and affluence, older workers find themselves disadvantaged in their efforts to retain employment and especially to regain employment when displaced from jobs;

(2) The setting of arbitrary age limits regardless of potential for job performance has become a common practice, and certain otherwise desirable practices may work to the disadvantage of older persons;

(3) The incidence of unemployment, especially long-term unemployment with resultant deterioration skill, morale, and employer acceptability is relevant to the younger ages, high among older workers; their numbers are great and growing; and their employment problems grave;

(4) The existence in industries affecting commerce, of arbitrary discrimination in employment because of age, burdens commerce and the free flow of goods in commerce;

(b) It is therefore the purpose of this Act [29 U.S.C.S. §§621 et seq;] to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination and employment; to help employers and workers find ways of meeting problems arising from the impact of age on employment;
(Dec. 15, 1967, P.L. 90-202, §2, 81 Stat. 602.)

§623. Prohibition of age discrimination

(a) Employer practices. It shall be unlawful for an employer —

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment, because of such individual's age;

(2) To limit, segregate or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee because of such individual's age; or

(3) To reduce the wage rate of any employee in order to comply with this Act [29 USCS §§621 et seq.].

§626. Recordkeeping, investigation and enforcement.

(b) Enforcement; prohibition of age discrimination under fair labor standards; unpaid minimum wages and unpaid overtime compensation; liquidated damages; judicial relief; conciliation, conference and persuasion.

The provisions of this Act shall be enforced in accordance with the powers, remedies, and procedures provided in Sections 11(b), 16 (except for subsection (a) thereof), and 17 of the Fair Labor Standards Act of 1938, as amended (29 USC §211(b), 216, 217) [29 USCS §§211(b), 216, 217] and subsection (c) of this section. Any act prohibited under section 4 of this Act [29 USCS §623] shall be deemed to be a prohibited act under Section 15 of the Fair Labor Standards Act of 1938, as amended (29 USC 215) [29 USCS §215]. Amounts owing to a person as a result of a violation of this Act shall be deemed to be unpaid minimum wages or unpaid overtime compensation for purposes of Sections 16 and 17 of the Fair Labor Standards Act of 1938, as amended (29 USC 216, 217) [29 USCS §§216, 217]: Provided, That liquidated damages shall be payable only in cases of willful violations of this Act. In any action brought to enforce this Act the court shall have jurisdiction to grant such legal or equitable relief as may be appropriate to effectuate the purposes of this Act, including without limitation judgments compelling employment, reinstatement or promotion, or enforcing the liability for amounts deemed to be unpaid minimum wages or unpaid overtime compensation under this section. Before instituting any action under this section, the Secretary shall attempt to eliminate the discriminatory practice or practices alleged, and to effect a voluntary compliance with the requirements of this Act through informal methods of conciliation, conference, and persuasion.

(Dec. 15, 1967, P.L. 90-202, §7, 81 Stat. 604; Apr. 6, 1978, P.L. 95-256, §4(a), (b)(1), (c)(1), 92 Stat. 190, 191.)

STATEMENT OF THE CASE

Petitioner, Dorothy E. Dreyer (hereinafter "Dreyer") and Naomi Strayer (hereinafter "Strayer") instituted a civil action alleging a violation of the Age Discrimination In Employment Act, Title 29, U.S.C. §§621, et seq., (hereinafter "ADEA") in the United States District Court for the Western District of Pennsylvania against the ARCO Chemical Company (hereinafter "ARCO") on August 10, 1983.[1]

The case, docketed as Civil Action No. 83-2001, was tried before a jury and presided over by the Honorable Alan N. Bloch, United States District Judge. The jury returned a verdict in favor of the plaintiffs below, finding that ARCO had discriminated against Dreyer and Strayer because of their age in violation of Title 29, U.S.C. §623(a)(1).

The jury awarded $66,043.99 in back pay to Strayer and $68,367.75 to Dreyer based upon the parties' stipulation as to damages. The jury further found that ARCO had "wilifully" discriminated against Dreyer as that term has been defined by the ADEA and the United States Supreme Court and awarded her liquidated damages in an amount of her backpay, Title 29, U.S.C. §626(b), for a total award to Dreyer of $136,725.50.

Following the denial of ARCO's Motion For Judgment Notwithstanding the Verdict, ARCO filed a timely Appeal to the Third Circuit Court of Appeals. The Appellate Court, in an Opinion by Circuit Judge Dolores K. Sloviter, affirmed the denial of ARCO's Motion For Judgment Notwithstanding the Verdict insofar as it upheld the jury's finding of liability to Dreyer and Strayer, and the assessment of compensatory damages to the plantiffs below. The Court of Appeals, however, reversed the District Court's Order upholding the jury finding that ARCO acted willfully in discharging Dreyer.

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1. Naomi D. Strayer is not a party to the instant Petition.

The evidence presented at trial established that both Dreyer and Strayer were long-term employees of the Beaver Valley Plant of ARCO Chemical Company or its predecessor companies, Dreyer having been employed since 1959 and Strayer since 1963. Due to adverse economic conditions and a corporate reorganization, ARCO had determined to reduce and consolidate its work force throughout its system. Both Dreyer and Strayer were at that time employed in the Financial Controls Department at the Beaver Valley plant. ARCO's plan to reduce its employment force resulted in its establishing a goal of reducing the number of employees in that department from 26 to 18.

In an effort to reduce the number of employees, ARCO implemented an ostensibly voluntary early retirement program, whereby those persons over the age of 55, with 15 or more years of service in the company, who were not eligible to retire under the terms of the regular retirement plan would receive some additional severance benefits. At this time, both Dreyer and Strayer were over the age of 55 and thus eligible for inclusion in the Special Early Retirement program. Both decined to avail themselves of this "voluntary" opportunity, however, whereupon they were advised that if they did not retire, they would be summarily discharged from employment. Threatened with the reality of losing their retirement benefits, Dreyer and Strayer accepted early retirement under memoralized protest.

In the midst of this reduction in force, however, certain employment opportunities within the Beaver Valley Plant remained for which both parties' witnesses established Dreyer was clearly qualified. ARCO's witnesses testified that they knew Dreyer was more qualified than those individuals who filled the Senior Accounting Clerk and Senior Payroll clerk positions, and that further Dreyer was qualified for the computer operator job, ultimately given to a younger woman. While Dreyer's supervisor claimed that he had forgotten about her training

in the Data 100 Computer System, the jury could and did come to the conclusion that ARCO had refused to consider Dreyer for the position because of her age, and that the reasons given for denying Dreyer continued employment were mere pretext.

The jury also heard testimony which established that those employees who accepted early retirement under ARCO's plan were arbitrarily denied consideration for reinstatement in any form, while those employees under age 55 were to be considered layoffs subject to recall. ARCO undertook no individual employee evaluations in its effort to reduce its staff but instead simply targeted those persons over age 55 for the Special Early Retirement Program. In fact, all of those eliminated from the financial controls department were over 55 years of age.

The decision to terminate Dreyer, despite her obvious and admitted qualifications, was made despite ARCO's admission that all of those involved in implementing the reduction in force plan were well aware of the responsibilities of the company under the ADEA (29 USCA §§621, et seq.). The jury, properly instructed pursuant to the *Trans World Airline, Inc. v. Thurston,* 469 U.S. 111, 105 S.Ct. 613, 83 L.Ed 2d. 523 (1985) standard for willfulness, returned a verdict in favor of Dreyer, finding that ARCO's discharge of Dreyer was not only willful, but "malicious."

The Third Circuit Court of Appeals, while finding no error in the jury determination of liability, nor the Court's instruction to the jury on the issue of willfulness, reversed the award of liquidated damages to Dreyer based upon its opinion that a willful violation of the Age Discrimination In Employment Act must involve outrageous conduct on the part of the employer.

REASONS RELIED UPON FOR THE ALLOWANCE OF THE WRIT

Petitioner respectfully represents that this Court should exercise its sound judicial discretion and grant Petitioner's Petition for Writ of Certiorari for the following reasons:

The Opinion and Order of the United States Court of Appeals for the Third Circuit, reversing the award of liquidated damages to Petitioner, is contrary to the general principles enunciated by this Court.

The United States Court of Appeals for the Third Circuit has created a standard for the willful violation of the Age Discrimination In Employment Act that is in conflict with a recent dicision by this court, and is also in conflict with each of the other United States Courts of Appeals that have had occasion to examine this standard.

While this Court has determined that a showing of a willful violation of the ADEA can be made by demonstrating that the employer either knew or showed a reckless disregard for whether its conduct was prohibited by the Act, the United States Court of Appeals for the Third Circuit redefined this standard to require that an ADEA plaintiff prove outrageous conduct by the defendant in order to be entitled to liquidated damages. This element places a burden upon a plaintiff in an age discrimination case which far exceeds that contemplated by Congress when the statute was enacted.

Further, the reason given by the United States Court of Appeals for the Third Circuit in refusing to apply the standard of willfulness as recently enunciated by this Court, was that the "knew or showed reckless disregard" standard was inapplicable to a case involving "disparate treatment in a discrete employment situation." Neither this Court nor any of the other Circuit Courts throughout the United States makes a distinction in applying this

Court's standard for willfulness, and apply the *Thurston* standard in cases of both disparate impact and disparate treatment.

This case presents an important issue in the field of civil rights litigation, which the Petitioner respectfully submits should be addressed and clarified by this Honorable Court.

ARGUMENT

I. THE THIRD CIRCUIT COURT OF APPEALS ERRED IN ADOPTING A DEFINITION OF WILLFULNESS UNDER THE AGE DISCRIMINATION IN EMPLOYMENT ACT WHICH SAID DEFINITION IS IN DIRECT CONFLICT WITH THE APPLICABLE DECISION OF THE UNITED STATES SUPREME COURT.

A. GENERAL PRINCIPLES ENUNCIATED BY THE SUPREME COURT.

Title 29, Section 626(b), provides in pertinent part that, "liquidated damages shall be payable only in cases willful violations of [the Age Discrimination In Employment Act]" (29 USC §§621 et seq.). That same subsection also provides that the Age Discrimination in Employment Act, "shall be enforced in accordance with the powers, remedies and procedures provided in the Fair Labor Standards Act (29 USC §§201, et seq.)" While the ADEA specifically provides that the criminal penalties imposed pursuant to Section 16(a) of the FLSA (29 USC §216(a)) will not be imposed upon an employer found to have violated the ADEA, the United States Supreme Court in *Trans World Airline, Inc. v. Thurston,* 469, U.S. 111, 105 S.Ct. 613, 83 L.Ed 2d. 523 (1985) has held that, "The manner in which FLSA Section 16(a) has been interpreted," is nevertheless relevant in determining the definition of a willful violation of the ADEA. *Thurston,* 105 S. Ct. at 624.

In the *Thurston* case, this Court was called upon to determine whether a policy adopted by TWA which discriminatorily impacted upon pilots 60 years of age or older was a willful violation of the ADEA, thus entitling the pilot plaintiffs to liquidated damages. This Court, in reversing the Second Circuit Court of Appeals decision to award the pilots liquidated damages, held that a violation of the ADEA is willful when the employer either knew or showed a reckless disregard for the matter of whether its conduct is prohibited by the ADEA. The *Thurston* Court specifically rejected the "in the picture" standard engendered by *Coleman v. Jiffy June Farms, Inc.*, 458 F. 2d 1129 (5th Cir. 1971), holding that Congress envisioned a two-tiered liability scheme whereby only those employers found to have willfully violated the provisions of the ADEA will be subject to the liquidated damages delineated in the statutes.

This Court made no distinction between cases in which a policy, neutral on its face, nevertheless impacts discriminatorily upon those persons protected under the ADEA, and those cases in which an individual member of the protected class is subject to an act of discrimination specifically directed at that individual. *Thurston* further held that an employer has a defense to an award of liquidated damages when it can show good faith and reasonable grounds for believing that it was not in violation of the ADEA. 105 S.Ct. at 625.

It is petitioner's position that the Third Circuit Court of Appeals erred in holding that the standard of willfulness enunciated by this court in *Trans World Airline, Inc. v. Thurston*, 105 S.Ct. 613 (1985) does not apply to disparate treatment cases brought under the ADEA. Whether this Court nor any other United States Court of Appeals has recognized nor made this distinction. The Court of Appeals further erred when it required Petitioner to prove outrageous conduct by the employer before she would be entitled to liquidated damages.

B. APPLICATION OF THOSE PRINCIPLES TO THIS CASE

1. *The Instant Case in Fact Involved the Application of a Policy, as in Thurston, not merely the Direction of a Decision at an Individual.*

The Third Circuit, in its opinion in this case, held that the "knew or showed reckless disregard" standard enunciated by this Court in *Thurston* was inappropriate in a case in which the alleged discriminatory conduct consisted of an action directed at an individual, although it would be appropriate in a case in which the discriminatory conduct consisted in the implementation of a policy impacting on a group.

No other United States Circuit Court of Appeals has rendered an opinion in a disparate treatment case under the ADEA in which it recognized any such distinction. See *Wilhelm v. Blue Bell, Inc.*, 773 F.2d. 1429 (4th Cir. 1985); *Galvin v. Bexar County, TX*, 785 F.2d. 1298 (5th Cir. 1986); *Williams v. Caterpillar Tractor Company*, 770 F.2d. 47 (6th Cir. 1985); *Matthews v. Allis-Chalmers*, 769 F.2d. 1215 (7th Cir. 1985); *Gilkerson v. Toastmaster, Inc.*, 770 F.2d. 133 (8th Cir. 1985); *Smith v. Consolidated Mutual Water Company*, 787 F.2d. 1441 (10th Cir. 1981); *Archambault v. United Computing Systems, Inc.*, 786 F.2d. 1507 (11th Cir. 1986). In none of the above cited disparate treatment cases was there any acknowledgement that the *Thurston* standard was limited in application to disparate impact cases.

Even if the Third Circuit's distinction here were valid, however, the instant case is *not*, as that Court suggests, a case in which the action of the employer is a decision directed at an individual. The claim of Petitioner here, in fact, is closer in kind to the *Thurston* case. Petitioner's claim clearly arises, not in the context of a decision directed at an individual but as the consequence of the adoption of a *policy*, to-wit, the forced retirement of

persons over 55 years of age as a means of accomplishing a reduction-in-force. In implementing that policy, the evidence showed, as indicated below, that the Respondent, as a matter of *policy*, made a discriminatory distinction between persons under 55 who accepted a special early *termination* and were eligible to be rehired, and those over 55 who accept special early *retirement* and were ineligible to be rehired. In the further implementation of that policy, the evidence showed that the Respondent intentionally and knowingly retained younger employees and assigned them to jobs for which they had no prior training and experience while forcing the early retirement of older employees who were known to be qualified to perform the work for which the untrained employees had been retained. Finally, the evidence showed that the implementation of the policy was facilitated by the creation of false and artificially low performance evaluations for the two employees who accepted retirement only under protest and only after they were threatened with immediate termination if they did not accept the policy of Special Early Retirement. Such a course of conduct so clearly evidences evil motive or bad purpose that it would seem to preempt the necessity for a discussion of the "knew or showed reckless disregard" standard. Nevertheless, applying the "knew or showed reckless disregard" standard of *Thurston* to these facts clearly justified a jury verdict of willfulness. The attempt by the Respondent to convince the jury that it acted in a good faith with respect to Petitioner Dreyer was resoundingly rejected.

2. *Where the Evidence Supports the finding that the Employer Acted in Bad Faith and with an Evil Purpose, the Distinction Between Disparate Treatment and Disparate Impact Cases is Unsupportable.*

In addition to proving that age was a determinative factor in the decisions to terminate her employment by

forcing her to accept retirement, the Petitioner must, according to the Third Circuit, also prove that the employer engaged in conduct which a jury could reasonably conclude was "outrageous."

In effect, the Third Circuit has engrafted upon the ADEA the Pennsylvania tort law standard for punitive damages. There is not one iota of evidence, however, that Congress intended such a consequence when it made the civil penalty provisions of the Fair Labor Standards Act applicable to ADEA violations.

There is no evidence that Congress intended anything more than to apply to employer conduct general principals relating to criminal culpability without, however, applying the criminal penalties of incarceration and fine. This Court recognized as much when it applied the standards of willfulness set forth in *United States v. Murdock*, 290 U.S. 389 (1933), a misdemeanor criminal case involving the willful failure to pay a tax due.

Clearly, neither a taxpayer's "failure to do various things thought to be requisite to a proper administration of the income tax law," *United States v. Murdock*, 290, U.S. 389, 397 (1933) nor a carrier's negligently failing to unload cattle from a railroad car, *United States v. Illinois Central Railroad Company*, 303 U.S. 239 (1938) are examples of "outrageous conduct," although equally clearly they justified the imposition of a civil punitive remedy, according to this Honorable Court.

Where, as here, an ADEA plaintiff has proven that an employer, well aware of its obligations under the ADEA, implements an involuntary retirement *policy* which denies re-employment to those forced to accept it, knowingly and intentionally denies jobs to older person who are qualified to take them while giving those same jobs to younger persons who are patently unqualified then falsifies both evaluations and trial testimony to justify its actions, the finding of willfulness is warranted. Neither this Court in the *Thurston* decision or any other United States Circuit Court of Appeals having occasion

to examine the issue of willfulness following the *Thurston* decision, has seen fit to create a different standard, nor add such an onerous element as "outrageousness." *EEOC v. Prudential Savings & Loan Association*, 763, F.2d. 1166 (10th Cir. 1985); cert. den. 106 S.Ct. 312 (1985). *Powell v. Rockwell International Corporation*, 788 F.2d. 279 (1986); *Wilhelm*, Supra; *Galvin*, Supra; *Williams*, Supra.; *Matthews*, Supra.; *Gilkerson*, Supra.; *Smith*, Supra.; *Archambault*, Supra.

3. *The Facts Proved in the Instant Case Were Sufficient to Support a Jury Finding of Willfulness in the Criminal Sense of the Word and in the Sense of Bad Faith or Evil Motive.*

This Court, in *Thurston*, relied upon interpretations of the word "willful" as set forth in a case involving criminal conduct. Cf. *United States v. Murdock*, 290 U.S. 389 (1933). The *Murdock* case involved the misdemeanor failure to pay a tax due, hardly the kind of conduct one would consider outrageous.

Accordingly, Petitioner contends that her evidence would have been sufficient to convict the Respondent of criminal conduct if intentional age discrimination were a crime. The evidence was more than sufficient to justify a jury finding that ARCO's termination of Petitioner was undertaken in bad faith and with evil motive and therefore deserving of punishment.

The evidence clearly supports the conclusion that ARCO intended to accomplish its reduction-in-force through the terms of a so-called voluntary early retirement plan applicable to persons 55 years of age or older with 15 years of service with the company (Joint Appendix p. 455). Accordingly, ARCO *specifically* targeted persons in the protected age group for termination (J.A., pp. 222-223). The jury could legitimately conclude that the company valued the abilities of its older workers less than its younger workers or it would have accomplished

its cutback following a thorough review of individual qualifications, abilities and performance.

In short, the jury could conclude that ARCO's policy of termination was targeted in terms of age.

The jury could further conclude that ARCO's motive was to discriminate against persons over 55 by comparing how they were treated to treatment accorded persons *under* 55 who were terminated under the so-called "Special *Termination* Plan." While persons under 55 were eligible to be rehired (J.A., p.p. 435-436), no re-hire provisions were contained in the Special Retirement Plan. Even if jobs later became available, therefore, persons whose jobs were terminated under the "Special Retirement Plan" could not take them while the younger employees could (J.A., p. 80).

Although ARCO claimed that the retirement plan was strictly "voluntary," the jury could conclude from the evidence that it was in fact not voluntary and that the employees who accepted it did so either because they were forced to, like Dreyer and Strayer, or that they did so because they were encouraged to do so as a result of unreasonable time pressure, incomplete information and hints by management that they were no longer considered useful employees.

With regard to Dreyer and Strayer, of course, the testimony was clear. Neither of them wished to retire. They accepted early retirement only because they had to. Accordingly, their retirement cannot be said to have been voluntary in any sense of the word. (J.A., pp. 81-82, 156).

A jury might be justifiably suspicious of the motives of a company which deliberately identifies a group of persons because of their age (over 55), makes them the first targets of the RIF (J.A., pp. 222-223. 455) and threatens them with firing if they refuse to retire.

A jury, equally suspicious, could legitimately ask why a company under economic pressure would want to get rid of its most experienced and loyal employees, even if it had to reduce its force.

The jury was aware that ARCO had done an age analysis (J.A., p. 466) and that ARCO knew that it had an "old" work force at the Beaver Valley Plant (J.A., p. 485). ARCO thus evidenced a motive to discriminate although such motive would not be necessary to support a criminal conviction.

The jury also knew that ARCO had evidenced a desire *not* to rehire employees 55 or older while indicating its willingness to rehire employees younger than 55 (J.A., pp. 80, 435-436).

The jury knew also that no employee evaluations and comparisions had been done prior to the initiation of the early retirement program. (J.A., pp. 227-228, 445, 478, 479).

The jury could conclude, therefore, that ARCO had evidenced a strong motivè to get rid of its older employees, regardless of their qualifications and abilities.

The jury could further conclude that ARCO pressured these employees into making a quick decision without complete information.

Although ARCO knew of the reduction in the summer (J.A., pp. 338, 451), it was not until November 9, 1981, that it announced the availability of the retirement plan (J.A., pp. 458-469), and then told the potential retirees they had to decide by December 1, 1981 (J.A., p. 469) when the deadline was actually January, 1982 (J.A., p. 446). ARCO did not advise the employees which jobs would be eliminated, or which consolidated and new jobs might be available after the reorganization (J.A., p. 477). They were given no opportunity to compete for the available jobs although ARCO permitted employees to bid after Strayer and Dreyer had been forced to retire (J.A., p. 404).

ARCO's witness Faulhaber admitted that at no time did he make any review of the histories of the retirees and made no effort to determine whether they were valuable, qualified or competent individuals (J.A., p. 228).

The jury could conclude that persons 55 years old or older were forced to retire even though there were job slots under the new organization that were not filled.

Defendants' Exhibit 26 (J.A., p. 551), shows a secretarial slot open even though Strayer had been terminated and could have performed it. The exhibit further shows openings for a senior accounting clerk and a senior payroll clerk, either of which jobs Dreyer could have taken and for which she had prior experience (J.A., pp. 40-41), as Hines admitted that he knew (J.A., p. 404).

The jury could conclude that ARCO intentionally retained under-55 employees in job slots for which they had no prior experience or training while forcing older employees with such experience and training to retire.

ARCO's Exhibit 26 (J.A., p. 551) shows that Marlea Roser was slotted to become an accounting clerk after the reorganization. Larry Fink testified that he did not know how Marlea Roser became an accounting clerk (J.A., p. 314). Hines admits that Roser had never been an accounting clerk before (J.A., p. 398). She had been a secretary and telephone operator (J.A., p. 397). Marlea Roser, Hines conceded, was simply one of the people who was left after the others were terminated (J.A., p. 398) and was a 3-minus (less than satisfactory) employee to boot (J.A., p. 399).

Mary Ann Vlasic, according to Defendant's Exhibit 26, was slotted in as a senior data entry clerk (J.A., pp. 551 and 715). Vlasic had been the mailroom clerk (J.A., p. 399). One percent of her job involved data entry (J.A., p. 400). Vlasic's performance for 1981 was a 3-minus (Plaintiff's Ex. 701, J.A., pp. 401, 718). Vlasic was 48 in January, 1981 (J.A., p. 188). Hines also testified, erroneously, that Dreyer had no Data training (J.A., p. 402) although he had previously acknowledged in a letter that she had been well-trained on the hardware and the Data 100 software (J.A., p. 90).

Accordingly, the jury could conclude that ARCO deliberately conducted its reorganization to eliminate persons over 55 even though there were jobs available for which they were qualified.

While Dreyer and Strayer offered no expert statistician, the data that was offered and from which the jury could draw their own conclusions, confirmed an intentional pattern.

Faulhaber testified that ARCO needed to reduce the number of people in the financial controls department by eight (J.A., p. 209).

He further admits that of the eight people eliminated from a department of 26, *all* were 55 or older.

Hines testified that in his department before the cutback, there were 13 people over 50. After the cutback only 6 people were over 50 (J.A., p. 351).

Hines further testified on cross-examination that for the year 1981, he performed annual salary adjustments for the employees under his supervision (J.A., p. 380). Those increases were recorded on Plaintiff's Exhibit 299 (J.A., p. 701). Those salary actions were to become effective in August of 1981, the summer that the RIF was initiated (Id).

Of the 21 employees listed, the salary increases ranged from 6 to 12 percent.

Of the 21 employees listed, seven were 55 or over, but only one, Hazy, got more than 6 percent. He got 8 percent. Every other person 55 or over, according to Hines' testimony, received the *minimum* of 6 percent (J.A., p. 381). No person under 55 received the minimum (J.A., p. 382). Was ARCO trying to get the message across to persons 55 or over that they could not expect to receive merit increases and that they were in danger of losing their jobs? Although they were all satisfactory employees, they got the same minimum percent increase as Strayer, who Hines claimed was a 4 (see heading "PC" on J.A., page 701).

These data, therefore, though not interpreted by a statistician, could well support a jury's conclusion that ARCO engaged in intentional conduct.

Finally, the jury could conclude that the credibility of ARCO's witnesses, particularly Fink and Hines, was so bad that the jury was justified in disbelieving anything they said and could conclude that they were attempting to cover up unlawful conduct.

Fink testified that Dreyer had never been trained on the Data 100. When confronted with her Data 100 training certificate, however, he claimed he forgot about it. (J.A., p. 296).

Further, Fink tried to convince the jury that Dreyer was a 3-minus performer but had to admit on cross-examination that he had marked her lower than she had deserved in a least two specific categories (J.A., pp. 306-307).

ARCO failed to call as a witness Marva Allen, the supervisor, who had given Dreyer a 3-minus for 1981 under circumstances in which she, Allen, knew a RIF was coming and that her duties and Dreyer's were redundant. The jury could construe this glaring failure as a failure by ARCO to substantiate its 1981 performance review of Dreyer.

Fitzpatrick, the plant manager, testified that cutbacks were necessary because the plant had to reduce its population because it was higher than quota. He admitted on cross-examination, however, when confronted with documentary evidence to the contrary, that the plant was already beneath quota in January, 1982, when the terminations of Dreyer and Strayer occurred (J.A., pp. 502-503).

Faulhaber testified that ARCO's employee relations department was *well aware* of the company's obligations under age discrimination statutes (J.A., p. 222). Assuming that to be the case, a jury could conclude that

ARCO's attempt to manufacture false reasons for termination evidenced ARCO's knowledge that its activities were unlawful.

In sum, the jury had ample evidence from which to conclude that ARCO *intentionally* targeted persons 55 or older to bear the burden of a RIF and carried out the reduction by forcing people to retire even though they did not want to do so and even though they were qualified to perform available jobs.

The evidence shows classic elements of criminal culpability: a known motive, a scheme to identify the employees in the specific age bracket over 55, a deliberate plan to eliminate them from positions for which they were known to be qualified while using employees known not to be qualified for those positions, an attempt to falsify the record as to qualifications and an effort to conceal wrongdoing with false trial testimony (the jury essentially found that Respondent's proffered reasons for the termination were untrue).

The evidence, therefore, is sufficient to justify the jury's verdict that ARCO engaged in willfully discriminatory conduct undertaken in bad faith and deserving of punishment in the form of liquidated damages.

CONCLUSION

For the reasons set forth herein, it is respectfully submitted that this Petition should be granted and a Writ of Certiorari should issue to review the Judgment Order of the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

FELDSTEIN GRINBERG STEIN
& MCKEE

By: Stanley M Stein

Stanley M. Stein, Esquire
Attorneys for Petitioner

CERTIFICATE OF SERVICE

I, Stanley M. Stein, Esquire do hereby certify that a true and correct copy of the foregoing Petition for Writ of Certiorari was mailed to Jess Womack at 1500 Market Street, Philadelphia, PA this 19 day of December, 1986 by U.S. mail, postage prepaid.

Stanley M. Stein

Stanley M. Stein, Esquire

86 - 1062 (2)

No.____

IN THE

SUPREME COURT OF THE UNITED STATES

Term, 19

DOROTHY E. DREYER,
Petitioner

v.

ARCO CHEMICAL COMPANY
A DIVISION OF,
ATLANTIC RICHFIELD COMPANY,
Respondent

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

DOROTHY E. DREYER and NAOMI D. STRAYER,	:	
Plaintiffs,	:	
vs.	:	Civil Action No. 83-2001
ARCO CHEMICAL COMPANY,	:	
Defendant.	:	

ORDER

AND NOW, this 31st day of July, 1985, upon consideration of Defendant's Motions for Judgment Notwithstanding the Verdict, New Trial, Remittitur and for a Stay filed in the above captioned matter on July 31, 1985,

IT IS HEREBY ORDERED that said Motions are DENIED.

United States District Judge

cc: Stanley M. Stein, Esquire
428 Boulevard of the Allies, Pittsburgh, PA 15219.

Charles W. Kenrick, Esquire
3180 U.S. Steel Building, Pittsburgh, PA 15219.

Jess Womack, Esquire
1500 Womack Street, Philadelphia, PA 19101.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 85-3476

DOROTHY E. DREYER
and
NAOMI D. STRAYER,

Appellees

v.

ARCO CHEMICAL COMPANY,
a Division of Atlantic Richfield Company,

Appellant

On Appeal from the United States District
Court for the Western District
of Pennsylvania (Pittsburgh)

(D.C. Civil No. 83-2001)

Argued April 28, 1986

Before: SLOVITER and STAPLETON, *Circuit Judges*,
and LONGOBARDI, *District Judge**

(Opinion filed September 22, 1986)

Jess Womack (Argued)
Atlantic Richfield Company
Philadelphia, PA 19102

Attorney for Appellant

---

*Honorable Joseph J. Longobardi, United States District Court for the District of Delaware, sitting by designation.

Stanley M. Stein (Argued)
Feldstein Grinberg Stein & McKee
Pittsburgh, PA 15219

Attorney for Appellees

OPINION OF THE COURT

SLOVITER, *Circuit Judge*.

ARCO Chemical Co. challenges a jury's decision that it violated the Age Discrimination in Employment Act, 29 U.S.C. §§ 621-34 (ADEA), when it terminated the employment of two long-term employees, plaintiffs Naomi Strayer and Dorothy Dreyer. It further contends that there was no evidence to support the jury's finding that its conduct as to Dreyer constituted a "willful" violation of the ADEA, entitling her to double damages.

I.

During a corporate reorganization in 1981 and 1982, ARCO consolidated the sub-units of one of its divisions, and as a consequence reduced the size of its work force at its Beaver Valley plant in Monaca, Pennsylvania. One of the departments of the plant affected by this reduction in force was the Financial Controls Department, which ARCO decided to reduce from 26 employees to 18. Plaintiffs Dreyer and Strayer were both employees in this department, and, according to ARCO, both were terminated as a result of the restructuring. Each had been offered the possibility of voluntary retirement under a special retirement plan applicable to employees over fifty-five years of age, neither volunteered to accept the company's offer, both were then terminated, and, only then, did they accept early retirement under protest. ARCO does not contend that their acceptance of the

early retirement benefits precludes them from exercising their rights under the ADEA.

Dreyer and Strayer filed suit together, claiming that ARCO's termination of their employment violated the ADEA and that the violations were intentional and willful. The jury returned a verdict for both plaintiffs. Based on the parties' stipulation as to damages, it awarded $66,043.99 in backpay to Strayer and $68,367.75 to Dreyer. In addition, the jury found that ARCO's discharge of Dreyer was "malicious" by so stating on its verdict sheet and awarded her statutory liquidated damages in the amount of her backpay for a total award of $136,725.50. *See* 29 U.S.C. § 626(b). The district court denied ARCO's motions for judgment notwithstanding the verdict and a new trial.

On appeal, ARCO's principal argument is that the evidence is insufficient to support a finding that it violated the ADEA with respect to the two plaintiffs, or, failing that, to support the jury's finding that it had acted "maliciously" or "willfully" in discharging Dreyer.[1]

II.

A.

Sufficiency of the Evidence to Support the Verdict

ARCO's principal argument on appeal is that it came forward with legitimate, nondiscriminatory reasons for retiring Dreyer and Strayer and that neither plaintiff proved that these reasons were pretextual. Preliminarily,

1. ARCO contends that the court should have charged the jury to subtract from any backpay awarded the amounts that the plaintiffs received under the special early retirement program. The district court decision was in line with our precedent disallowing reduction from ADEA backpay awards of social security benefits, Maxfield v. Sinclair International, 766 F.2d 788, 793-94 (3d Cir. 1985), *cert. denied*, 106 S. Ct. 796 (1986), and pension plan benefits, McDowell v. Avtex Fibers, Inc., 740 F.2d 214, 217-18 (3d Cir. 1984), *vacated and remanded on other grounds*, 105 S. Ct. 1159 (1985).

ARCO also contends that Stayer did not establish a prima facie case of age discrimination.

The ADEA broadly proscribes discrimination against any individual between 40 and 70 with respect to "compensation, terms, conditions, or privileges of employment, because of such individual's age." 29 U.S.C. § 623(a); *see id.* § 631(a). To recover, "a plaintiff must prove by a preponderance of the evidence that age was a determinative factor in the employer's decision." *Berndt v. Kaiser Aluminum & Chemical Sales, Inc.*, 789 F.2d 253, 256 (3d Cir. 1986).

The order and allocation of proof in an ADEA case alleging disparate treatment on the basis of circumstantial evidence is governed by the three-part division set forth in *McDonnell-Douglas Corp. v. Green*, 411 U.S 792 (1973), for Title VII cases. *See Smithers v. Bailar*, 629 F.2d 892, 894 (3d Cir. 1980). Under this scheme, the plaintiff must first prove a prima facie case. Then the burden of production shifts to the defendant to articulate a legitimate, nondiscriminatory reason for the plaintiff's discharge. If the employer meets this burden, the plaintiff must show that the articulated reason is a pretext for discrimination.[2] At all times, the plaintiff bears the ultimate burden of proving that age was "a determinative factor" in the decision. *See Texas Department of Community Affairs v. Burdine*, 450 U.S 248, 256 (1981);

2. ARCO argues that the court should have instructed the jury that it must find "by a preponderance of the evidence that the reasons given by ARCO for its termination of each plaintiff was [sic] in fact a pretext or cover-up for age discrimination." While such an instruction would ordinarily seem appropriate, in this case the district court specifically and repeatedly instructed the jury that it must find that age was a determinative factor in the plaintiffs' discharge. We have recently held that the plaintiff's burden of proving that the employer's reasons are pretextual merges with the plaintiff's ultimate burden to show age discrimination. *See Duffy v. Wheeling-Pittsburgh Steel Corp.*, 738 F.2d 1393, 1396 (3d Cir.), *cert. denied*, 105 S Ct. 592 (1984). We cannot find that the court's failure to give the specific instruction was reversible error. *See Fed. R. Civ.* P. 61.

Duffy v. Wheeling Pittsburgh Steel Corp., 738 F.2d 1393, 1395 (3d Cir.), *cert. denied*, 105 S. Ct. 592 (1984).

In an age discrimination case, in order to make out a prima facie case:

> a plaintiff must prove that he (1) was discharged; (2) was qualified for the position; (3) was within the protected class at the time of discharge; (4) was replaced by someone outside the protected class, or . . . by someone younger, or . . . show otherwise that his discharge was because of his age.

Elliot v. Group Medical & Surgical Service, 714 F.2d 556, 565 (5th Cir. 1983), *cert. denied*, 104 S. Ct. 2658 (1984); *Maxfield v. Sinclair International*, 766 F.2d 788, 792 (3d Cir. 1985). In a reduction in force situation, it is often impracticable to require a plaintiff whose job has been eliminated to show replacement. *See Williams v. General Motors Corp.*, 656 F.2d 120, 129 (5th Cir. 1981), *cert. denied*, 455 U.S. 943 (1982); *see also Massarsky v. General Motors Corp.*, 706 F.2d 111, 118 n.13 (3d Cir.) *cert. denied*, 464 U.S. 937 (1983) (nature of plaintiff's showing depends on circumstances of the case); Thompson, Houserman & Jordan, *Age Discrimination in Reduction-in-Force: The Metamorphosis of* McDonnell Douglas *Continues*, 8 Indus. Rel. L. Rev. 47, 57-58 (1986).

ARCO moved for a directed verdict at the close of plaintiffs' case, arguing that plaintiffs had not established a prima facie case. The district court denied this motion. Under our decision in *Berndt v. Kaiser Aluminum & Chemical Sales, Inc.*, 789 F.2d at 257, the issue of whether plaintiff established a prima facie case is subsumed on appeal into whether the plaintiff has sustained his or her ultimate burden of proving that age was a determinative factor in the plaintiff's termination.

In any event, the standards for reviewing the denial of a motion for a directed verdict and for a motion for judgment notwithstanding the verdict are not dissimilar. "We are required to 'review the record . . . in the light

most favorable to the non-moving party, . . . and to affirm the judgment of the district court denying the motions unless the record is critically deficient of that minimum quantum of evidence from which the jury might reasonably afford relief.' " *Black v. Stephens*, 662 F.2d 181, 187 (3d Cir. 1981) (motion for judgment n.o.v.), *cert. denied*, 456 U.S. 950 (1982) (quoting *Dawson v. Chrysler Motor Corp.*, 630 F.2d 950, 959 (3d Cir. 1980)). *See Inventive Music Ltd. v. Cohen*, 617 F.2d 29, 31 (3d Cir. 1980) (quoting *Fireman's Fund Insurance Co. v. Videfreeze Corp.*, 540 F.2d 1171, 1178 (3d Cir 1976) (directed verdict), *cert. denied*, 429 U.S. 1053 (1977)).

Plaintiffs do not dispute that ARCO may have had a legitimate economic reason to reduce its force. ARCO's explanations for the termination of both Strayer and Dreyer appear plausible on paper. However, since we are not the factfinders we must determine whether a jury, hearing the evidence and observing the witnesses, could have concluded that Strayer's and Dreyer's age (both over 55) played a part in ARCO's selection of them for termination.

1. *Strayer*

Strayer was 56 at the time of her termination. She had worked at the Beaver Valley plant since 1963, for most of her tenure as a secretary. Since 1975, Strayer had been secretary to Robert Hines, the manager of the Financial Controls Department.

The legitimate, nondiscriminatory reason articulated by ARCO for terminating Strayer was that it had evaluated the performance of its employees in connection with its reduction in force at the Beaver Valley plant and that Strayer was not only a below-average worker, but had the poorest performance of all clerical people at the plant. Hines . . . Strayer's immediate employer, testified to her low performance rating for 1980 and 1981,

and there was documentary evidence showing her tardiness and absenteeism. ARCO claimed that during the reduction in force it had naturally sought to rid itself of its weakest personnel and that Strayer's abilities, not her age, had been the reason she had been forced into early retirement.

In Strayer's attempt to prove that ARCO's asserted reasons were pretextual, she showed that although she had worked for the company for 17 years, ARCO was able to produce only two years' evaluations of her as unsatisfactory. In fact, Hines rated Strayer's performance on the performance evaluations for 1978 and 1979 as satisfactory or better. In addition, Strayer showed that she had merit salary increases in every year from 1976 to 1981, and that her salary evaluations for 1978, 1980 and 1981 were favorable. Hines testified on cross-examination that he had not intended to terminate her for her performance prior to the reduction in force.

Moreover, there was evidence that ARCO was not under an economic necessity to terminate Strayer. A secretarial position, remained open in the Financial Controls Department after Strayer's retirement, which was ultimately filled by an employee who was 32 years old.

Although Strayer's evidence that ARCO's reasons were pretextual is not overwhelming, a jury could reasonably have found from it that age was a determinative factor in her discharge.

2. *Dreyer*

Dreyer, who was 60 years old at the time her employment was terminated, was a computer operator in the Financial Controls Department. She had worked in the Beaver Valley plant since 1959. During the reorganization, Dreyer's job was eliminated and a new position was created which consolidated the duties of computer operator and data entry. ARCO officials testified that in

deciding who should fill the new position, they had compared Dreyer's qualifications with those of another employee in the department, Marva Allen, who was the data entry supervisor, and they concluded that Allen was better qualified to fill the new position. Allen was 38 years old at the time.

Since ARCO articulated a legitimate reason for Dreyer's termination, Dreyer had the burden to prove that ARCO's asserted reason was pretextual as part of her continuing burden to prove that age was a determinative factor in ARCO's decision to terminate her employment.

Dreyer appears to have tried her case as to pretext on the theory that once her job was eliminated, she should have been given either the new job of remote job entry operator or another comparable job for which she was qualified. Dreyer challenged ARCO's evidence that she was less qualified than Allen. She attacked the evaluation process itself and produced evidence that her 1981 performance evaluation was made by Allen, her rival for the job.

Dreyer also stressed that she was not offered any other available position although there were jobs in the restructured Financial Controls Department for which she was qualified and which she had filled in the past. Two such jobs as payroll clerks were given to younger women, aged 27 and 40, who had little or no experience in them, and women significantly younger than Dreyer were given positions in data entry. Given this evidence, we cannot overturn the jury's verdict that age was a factor in Dreyer's termination.

In summary, both Dreyer and Strayer presented prima facie cases of age discrimination. ARCO presented evidence from which a jury could conclude that it retired the plaintiffs for reasons other than age. Much of the evidence before the jury required its evaluation of the credibility of the witnesses. Plaintiffs introduced evidence to show pretext. The jury chose to accept

plaintiffs' evidence that the asserted reasons were pretextual. We therefore affirm the district court's denial of ARCO's motion for judgment notwithstanding the verdict insofar as it sought to overturn the jury's finding that ARCO violated the ADEA in terminating both plaintiffs.

B.

Sufficiency of the Evidence to Support the Finding of Willfulness

The ADEA provides that "liquidated damages shall be payable only in cases of willful violations. 29 U.S.C. § 626(b). The statute defines liquidated damages by reference to the Fair Labor Standards Act as an amount equal to the losses sustained in lost wages and other benefits, 29 U.S.C. §§ 216(b). The jury awarded liquidated damages to Dreyer. ARCO does not challenge the district court's instruction to the jury on the issue of willfulness. Instead it argues that the evidence was insufficient to meet the requisite standard of willfulness under the statute.

ARCO accurately notes that the courts have struggled with what constitutes a willful violation of the ADEA since enactment of the statute in 1968. Recently, some light has been shed on that issue by the Supreme Court's decision in *Trans World Airlines, Inc. v. Thurston*, 105 S. Ct. 613 (1985). In *Thurston*, the Court upheld the finding that the ADEA was violated by a policy of Trans World Airlines that allowed captains displaced for reasons other than age to "bump" less senior flight engineers but denied that "privilege of employment" to captains compelled by the collective bargaining agreement to vacate their positions when they reached 60. The Court held that TWA's transfer policy discriminated on its face against protected individuals on the basis of age.

On the other hand, the Court reversed the finding that TWA's violation was willful. The Court stressed that

"[t]he legislative history of the ADEA indicates that Congress intended for liquidated damages to be punitive in nature," *Id.* at 624. The Court held that it was "acceptable" for the circuit court to have articulated a standard under which conduct was willful if "the employer . . . knew or showed reckless disregard for . . . whether its conduct was prohibited by the ADEA." *Id.* at 625-26. It held, however, that TWA's conduct was not a willful violation of the Act because it had adopted its plan only after conferring with its lawyers and the Union in an attempt to bring its retirement policy in line with the ADEA and to comply with its collective bargaining agreement. *Id.* at 626.

Many cases since *Thurston* have extracted from it the dual "knew or showed reckless disregard" test of willfulness to all claimed violations of the ADEA. However there is a distinction between cases where the employer action that is claimed to violate the ADEA consists of adoption of a policy, as in *Thurston*, and cases where the employer action consists of a decision directed at an individual, such as termination or demotion. The "knew or reckless disregard" standard is particularly apt in the former situation, which is illustrated by *Whitfield v. City of Knoxville*, 756 F.2d 455 (6th Cir. 1985). There the City involuntarily retired policemen and firemen, and defended against a claim for double damages on the ground that it believed in good faith that the ADEA could not constitutionally be applied to it. In such a situation, it is meaningful to inquire whether the employer knew that the action was in violation of the Act or whether it acted in reckless disregard of the prohibitions of the ADEA.

On the other hand, the "knew or reckless disregard" standard is not easily incorporated in cases alleging disparate treatment in a discrete employment situation. With respect to the "knew" prong of that test, as the Supreme Court recognized in *Thurston*, "As employers are required to post ADEA notices, it would be virtually impossible for an employer to show that he was unaware of

the Act and its potential applicability," *Thurston*, 105 S. Ct. at 625. For similar reasons, an inquiry into "reckless disregard", which is an alternate for "knew", would also not be meaningful to most disparate treatment claims. Because the "willful" inquiry arises only after the employer has been found to be liable under the ADEA, the factfinder would already have found that the employer used age as a "determinative" factor in the employment decision.

There is a danger that use of the "knew or reckless disregard" standard for a discrete employment decision that has been made on the basis of age would in effect allow the recovery of liquidated damages any time there was a violation of the Act. However, it is clear from *Thurston* that the Supreme Court rejected such an interpretation. See *id.* at 625 n.22. the Court explicitly stated that "[b]oth the legislative history and the structure of the statute show that Congress intended a two-tiered liability scheme," *Id.* at 625. Therefore we must interpret the liquidated damages provision in a manner that effectuates this intent. See *Brock v. Richland Shoe Co.*, No. 85-1305 (3d Cir. Aug. 15, 1986).

Before the *Thurston* decision, this court held that "It is sufficient [for a willful violation of the ADEA] to prove that the company discharged the employee because of age and that the discharge was voluntary and not accidental, mistaken, or inadvertent." *Wehr v. Burroughs Corp.*, 619 F.2d 276, 283 (3d Cir. 1980); *McDowell v. Avtex Fibers, Inc.*, 740 F.2d 214, 218 (3d Cir. 1984), *vacated and remanded on other grounds*, 105 S. Ct. 1159 (1985). Because Thurston makes clear that we must interpret the liquidated damages provisions in a way that would not permit "an award of double damages in almost every case," *Thurston*, 105 S. Ct. at 625, we must seek a standard for willfulness that distinguishes between a

violation, which is almost always intentional, and a willful violation, leading to double damages.[3]

The Court in *Thurston* suggested that this could be done by recognition that "Congress intended for liquidated damages to be punitive in nature." *Id.* at 624. We recognize that the general standard for punitive damages also encompasses an inquiry into "defendant's evil motive or his reckless indifference to the rights of others." *See* Restatement (Second) of Torts § 908(2) (1977). However, the *Thurston* Court disclaimed a need to show "evil motive or bad purpose" as an element of willfulness, *Thurston,* 105 S. Ct. at 624 n. 19. Hence, more assistance for our purposes may be afforded by other aspects of the punitive damages standard.

Section 908(1) of the Restatement (Second) of Torts provides that "[p]unitive damages are damages, other than compensatory or minimal damages, awarded against a person to punish him for his outrageous conduct and to deter him and others like him from similar conduct in the future." The essence of punitive damages is that they may be awarded "for conduct that is *outrageous,* "Restatement (Second) of Torts § 908(2) (emphasis added).

When there has been intentional conduct we have inquired whether there was evidence of malice. *See Zippertubing v. Teleflex, Inc.,* 757 F.2d 1401, 1414 (3d Cir. 1985). In a thoughtful discourse on the application of punitive damages in strict liability cases, our colleague Judge Becker stressed the need for evidence showing

3. In *Brock v. Richland Shoe Co.,* No. 85-1305, slip op. (3d Cir. Aug. 15, 1986), a case construing "willfulness" for purposes of the statute of limitations under the FLSA, 29 U.S.C § 255(a), we remanded to the district court for consideration of the *Thurston* standard. In the posture of that case on appeal, we were not required to make a review of the record evidence of willfulness. In this case it is the necessity of such a review that caused us to undetake the analysis set forth in the text regarding the application of the *Thurston* standard.

outrageous or comparable conduct. *See Acosta v. Honda Motor Co.*, 717 F.2d 828, 839-41 (3d Cir. 1983). In *Berroyer v. Hertz*, 672 F.2d 334, 340 (3d Cir. 1982), we quoted the comments to section 908(2) of the Restatement (Second) of Torts which state in part, "since the purpose of punitive damages is not compensation of the plaintiff but punishment of the defendant and deterrence, these damages can be awarded only for conduct for which this remedy is appropriate — which is to say, conduct involving some element of outrage similar to that usually found in crime."

In sum, in some ADEA violations that are claimed to be willful, it will be sufficient to uphold a finding of willfulness through evidence that the defendant embarked on a policy or generally applicable course of conduct which it knew violated the ADEA or that it acted in reckless disregard of whether that conduct violated the Act. If an employer can show good faith and reasonable grounds for believing it was not in violation of the Act, a willfulness finding would be inappropriate. *See Thurston*, 105 S. Ct. at 625 n. 22.

Where an employer makes a decision such as termination of an employee because of age the employer will or should have known that the conduct violated the Act. Nonetheless, in order that the liquidated damages be based on evidence that does not merely duplicate that needed for the compensatory damages, there must be some additional evidence of outrageous conduct. The Restatement suggests that in assessing punitive damages, "the trier of fact can properly consider (*inter alia*) the character of the defendant's act, [and] the nature and extent of the harm to the plaintiff that the defendant caused or intended to cause." *See* Restatement (Second) of Torts § 908(2).

We cannot provide a litany of situations that would warrant a factfinder in finding willfulness. In some cases, evidence that the employer had previously violated the ADEA might warrant imposition of liquidated

damages to effectuate the deterrent purpose underlying the willfulness provision. In other cases, termination of an employee at a time that would deprive him or her of an imminent pension might show the "outrageousness" of conduct that would warrant double damages. The circumstances of the violation itself may be so egregious, such as, for example, the systematic purging of older people from the employee staff, that double damages might be warranted to effectuate the punitive aspect of the willful secton. In most cases, as is true of punitive damages generally, the appropriateness of the award will be dependent upon an ad hoc inquiry into the particular circumstances.

Turning to the evidence produced by Dreyer, we conclude that it falls short of the "minimum quantium" needed to support a finding of willfulness. ARCO was undeniably in the process of restructuring and reducing the employee personnel of the plant and the Financial Controls Department in which she worked. Dreyer does not contend that elimination of her job was a pretext to terminate her.

Dreyer emphasizes the evidence that ARCO did an "age analysis" of its work force, that the executive responsible for implementing the plan knew that Beaver Valley had an "old" work force,[4] and that after the reorganization, the Financial Controls Department had only 6 employees over the age of 50 while before it had 13 such employees. However, the undisputed evidence is that at least 5 employees in that department accepted the special early retirement program for which they were eligible. Dreyer does not suggest and did not produce

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4. Dreyer's characterization of the evidence is not quite exact, since the plant manager's exact statement was, "Of course it was quite an old work force because it was an old plant and interesting enough is was bimodal distribution, we had a group of older employees and younger employees and a bit of a void in between." App. at 485.

evidence that such acceptance was anything but voluntary, and concedes in her brief that the Special Early Retirement Plan produced 6 of the 8 employees needed for reduction in the Financial Controls Department. Brief for Appellees at 12. Hence, the record will not support a conclusion that Dreyer's discharge was part of a pattern of conduct to involuntarily terminate personnel in the protected group.

Nor are there any other aggravating factors that would warrant punitive damages. Although Dreyer points to the evidence that ARCO failed to appoint her to other available jobs filled by younger employees, such evidence shows, at most, a violation of the ADEA, but not the outrageous conduct needed to distinguish a violation from willful action. On the basis of the record evidence, we cannot sustain the award of liquidated damages to Dreyer.

III

For the reasons set forth above, the order of the district court denying ARCO's motion for judgment notwithstanding the verdict will be affirmed insofar as it upholds the jury's finding of liability to Strayer and Dreyer, and its assessment of damages. The order will be reversed insofar as it upholds the jury's finding that ARCO acted willfully in discharging the plaintiff Dreyer, and its assesment of double damages. Costs to be assessed in favor of appellees.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

(3)

No. 86-1062

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1986

DOROTHY E. DREYER,
Petitioner

v.

ARCO CHEMICAL COMPANY,
A DIVISION OF
ATLANTIC RICHFIELD COMPANY,
Respondent

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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15 pp

QUESTION PRESENTED

Whether a plaintiff in a suit under the Age Discrimination in Employment Act may recover liquidated damages without adducing any evidence of a knowing violation or of reckless disregard of the law.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—*(Continued)*

No. 86-1062

IN THE
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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Respondent, ARCO Chemical Company,* respectfully submits that the Petition for a Writ of Certiorari should be denied.

*Statement pursuant to Rule 28.1: ARCO Chemical Company is an unincorporated division of Atlantic Richfield Company. Other than wholly owned subsidiaries, and other unincorporated divisions, there are no affiliates of ARCO Chemical Company or Atlantic Richfield Company.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals was entered on September 22, 1986. This Court has jurisdiction pursuant to 28 U.S.C. Sections 1254(1) and 2101(c).

APPLICABLE STATUTE

Section 7(b) of the Age Discrimination in Employment Act, Title 29, Section 626(b), United States Code, quoted at pages 2-3 of the Petition.

COUNTERSTATEMENT OF THE CASE

In 1981 and 1982, ARCO Chemical Company sought to increase efficiency by consolidating several operating units and eliminating redundant positions. One result of that reorganization was a reduction in force from 26 to 18 in the number of employees needed by the Financial Controls Department at ARCO's Monaca, Pennsylvania plant. Dorothy Dreyer was one of the employees whose positions were eliminated. At the time of the reduction in force, Ms. Dreyer was not yet old enough to qualify for ordinary retirement. However, along with anyone else in the department who was at least 55 years of age, Dreyer became eligible for special early retirement and pension benefits in connection with the reduction in force.

After initially rejecting retirement, Dreyer elected to accept retirement under the special program. Shortly thereafter, however, she sued ARCO under the ADEA. She asserted that she had been the best qualified person for one or the other of two positions which opened up in the department after her retirement. Dreyer has never asserted that there was any discrimination in the elimination of her position. Her sole grievance has been a contention that she should have been offered another position. There was no evidence that Dreyer ever took any action to apply for any such position.

A jury returned a verdict for Dreyer and awarded her over $68,000 in backpay. The jury also awarded liquidated damages, doubling Dreyer's award.

The Court of Appeals for the Third Circuit (*Sloviter*, Stapleton, Longobardi [D. Del.]) affirmed the finding of an ADEA violation, but reversed the award of liquidated damages. Applying this Court's recent decision in *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111 (1985), the Court of Appeals concluded that Dreyer had failed to adduce evidence sufficient to permit a finding that there had been a "willful" violation. The Court of Appeals noted that liquidated damages under the ADEA are intended to be "punitive," and noted the complete absence of any aggravating factors. For example, not only was there no evidence of any prior violation of the ADEA by ARCO; there was no evidence of action to deprive an employee of an imminent pension, and in fact the evidence with respect to the special retirement program offered in connection with the RIF showed the opposite; and there was no evidence of systematic purging of older persons from the workforce. The Court of Appeals concluded that the "evidence shows, at most, a violation of the ADEA," but not a "willful" violation.

REASONS FOR DENYING THE WRIT

In *Trans World Airlines, Inc. v. Thurston*, this Court held that awards of liquidated damages under the ADEA cannot stand absent evidence of heightened culpability — either specific intent or reckless disregard. The decision of the Third Circuit in the present case is nothing more, and nothing less, than a straightforward and uncontroversial application of *Thurston*. Contrary to petitioner's suggestion that the Third Circuit has ordained a sweeping and erroneous new rule of law, the Court of Appeals has simply discharged its important duty of carrying out this Court's mandates and providing concrete guidance to the district courts in fashioning

workable rules of proof and jury instructions. The Third Circuit's ruling is totally consistent with the decisions of the other courts of appeals that have considered liquidated damages awards since *Thurston*. Review on certiorari would primarily involve this Court in reevaluating the sufficiency of evidence, which this Court has repeatedly said is the function of the Courts of Appeals.

I. The Decision Of The Third Circuit Is A Proper Application of *Thurston* And Announces No New Rule of Law

Before 1985, there was considerable confusion in the lower courts with respect to Section 7(b) of the ADEA, which restricts awards of double damages to cases of "willful" violations. Thus, two Courts of Appeals held prior to 1985 that a violation was "willful" and could support an award of liquidated damages if the employer knew that the ADEA was "in the picture." *EEOC v. Central Kansas Medical Center*, 705 F.2d 1270, 1274 (CA10 1983); *Coleman v. Jiffy June Farms, Inc.*, 458 F.2d 1139, 1142 (CA5 1971). The Third Circuit went even further and held that an employee seeking double damages was only required to show that the employment decision had been based upon age and that the action "was voluntary and not accidental, mistaken, or inadvertent." *Wehr v. Burroughs Corp.*, 619 F.2d 276, 283 (CA3 1980).

Under the approach taken by these courts, and especially under the Third Circuit standard, the issue of "willfulness" could go to the trier of fact in virtually any ADEA case. As a result, entitlement to full compensatory relief identical to that available under other antidiscrimination statutes (backpay, counsel fees, and costs of suit) tended to merge with entitlement to punitive damages in ADEA cases.

In its 1985 *Thurston* decision, this Court provided much-needed guidance to the lower courts. The Court began with the language of the ADEA and noted that entitlement to double damages is "significantly

qualified" by the proviso of ADEA Section 7(b) limiting liquidated damages to "cases of willful violations." This Court reviewed not only the legislative history of the ADEA, but also the history of the Fair Labor Standards Act — the source, with significant modifications, of the scheme of remedies provided for under the ADEA — and concluded that the ADEA had been carefully crafted to provide for a two-tiered liability scheme; that "Congress intended for liquidated damages to be punitive in nature;" and that the word "willful" in Section 7(b) should be interpreted to mean what it means in the FLSA provision subjecting an employer to criminal penalties: either a deliberate violation or a situation in which the employer "wholly disregards the law . . . without making any reasonable effort to determine whether the plan he is following would constitute a violation of the law." 469 U.S. at 125-26, 128 and n.22. This Court squarely rejected the "in the picture" tests of the Fifth and Tenth Circuits, noting that they "would result in an award of double damages in almost every case." *Id.* at 128 and n.22. In so doing, this Court necessarily overruled the Third Circuit's "not accidental" standard.

Dreyer asserts that in the present case, the Third Circuit held that *Thurston* "does not apply to disparate treatment cases." Pet. for Cert. at 9. That is simply not so. In a post-*Thurston* disparate treatment decision that has been conspicuously omitted from the Petition, but which was expressly relied upon in the opinion below, the Third Circuit held that willfulness will be found if the employer "knew or showed reckless disregard for the matter of whether its conduct is prohibited by the ADEA." *Berndt v. Kaiser Aluminum & Chemical Sales, Inc.*, 789 F.2d 253, 260 (CA3 1986). It should be indisputable that that is exactly what this Court directed in *Thurston*.

In the present case, the Third Circuit faithfully followed this Court's holding in *Thurston* as reiterated in *Berndt*, and at the same time provided the lower courts in the Third Circuit with additional guidance as to what

sorts of evidence might and might not suffice to show recklessness in the context of disparate treatment cases. In a disparate treatment case, a bald instruction in conclusory terms (to the effect that an ADEA violation is "wiilful" if the employer knew that its conduct violated the statute or acted in reckless disregard of whether it did or did not) would provide little guidance to the jury. In fact, reliance upon such an instruction could do violence to *Thurston*'s requirement that liquidated damages be based upon evidence that does not merely duplicate that needed for compensatory damages.

Accordingly, the Court of Appeals held that an award of double damages in such a case requires "some additional evidence of outrageous conduct" beyond that necessary simply to show a violation of the statute. 801 F.2d at 658. The Court of Appeals then went on to specify a number of examples of such evidence, stressing that its list was by no means complete and that appropriateness of particular awards would depend upon the facts of particular cases. That list included "evidence that the employer had previously violated the ADEA," "termination of an employee at a time that would deprive him or her of an imminent pension," and evidence tending to show "the systematic purging of older people from the employee staff." *Id.*

There is no basis at all for believing that anything which this Court would view as "reckless" would fail to sustain an award of liquidated damages in a Third Circuit ADEA case. The Third Circuit's analysis is precisely consistent with *Thurston* and does nothing more or less than put additional flesh on the complex legal label of "recklessness." That is especially evident on the facts of the present case, involving a *de minimis* charge in which the Court of Appeals recognized that the evidence showed "at most" an ADEA violation. 801 F.2d at 659.

II. There Is No Conflict In Decisions Of The Courts Of Appeals

At page 10 of the Petition, Dreyer cites seven appellate cases, apparently for the purpose of suggesting to this Court that there is a conflict in the Circuits. In fact, the courts either struck down or affirmed the denial of awards of liquidated damages in all but one of those cases. *Matthews v. Allis-Chalmers*, 769 F.2d 1215, 1218-19 (CA7 1985) (affirming summary judgment for *employer*; no mention of liquidated damages); *Williams v. Caterpillar Tractor Co.*, 770 F.2d 47, 50-51 (CA6 1985) (reversing verdict awarding liquidated damages; in light of *Thurston*, evidence insufficient as a matter of law to sustain finding of "willfulness"); *Gilkerson v. Toastmaster, Inc.*, 770 F.2d 133, 137 (CA8 1985) (same); *Wilhelm v. Blue Bell, Inc.*, 773 F.2d 1429, 1435-36 (CA4 1985) (setting aside verdict awarding liquidated damages; instruction held too similar to the standards discredited in *Thurston*); *Smith v. Consolidated Mutual Water Co.*, 787 F.2d 1441, 1443 (CA10 1986) (affirming district court's denial of liquidated damages); *Archambault v. United Computing Systems, Inc.*, 786 F.2d 1507, 1514 (CA11 1986) (vacating liquidated damages; district court applied a standard that would have been correct under pre-*Thurston* law of the Eleventh Circuit, but erred in light of *Thurston*). In the remaining case, the Fifth Circuit, noting evidence that the principal supervisors, with knowledge of the ADEA, had announced that age was the reason for the employment decision, held only that the district court's findings were not clearly erroneous. *Galvan v. Bexar County*, 785 F.2d 1298, 1307 and n. 15 (1986).

At page 13 of the Petition, Dreyer cites two additional cases from the courts that respectively decided *Smith* and *Galvan*: *EEOC v. Prudential Savings & Loan Ass'n*, 763 F.2d 1166 (CA10 1985); and *Powell v. Rockwell International Corporation*, 788 F.2d 279 (CA5 1986); with

the apparent purpose of asserting the existence of a conflict. The court in *Prudential*, however, did nothing more than adopt this Court's view, 469 U.S. at 126 n.19, that an ADEA plaintiff need not show "specific intent to violate the law" in order to recover double damages. 763 F.2d at 1174. And in *Powell*, relying on *Thurston*, the court held that the instruction on "willfulness" (that an ADEA violation is "willful" if the employer " 'should have known' the actions taken would violate the ADEA") was too liberal. The *Powell* court found the error to be harmless only because the jury in that case had specifically found that the employer had fired the employee in retaliation for his filing a claim of discrimination. 788 F.2d at 286. Retaliation, which requires proof of knowledge by the employer that the employee is asserting a violation of the ADEA, is one of the most obvious of the various conceivable aggravating factors that sustain findings of "willfulness" under *Thurston*.

None of the decisions cited by Dreyer even arguably declares a rule of law inconsistent with the Third Circuit's application of *Thurston* in the present case. To the contrary, each of them recognizes the explicit holding of *Thurston* that there must be a clear and comprehensible distinction between proof sufficient to sustain a finding of an ADEA violation, on the one hand, and the kind of recklessness or deliberate misconduct that Congress intended to reach with the punitive liquidated damages provision, on the other. Even if one undertakes the heavily factual analysis which Dreyer urges this Court to do, there is no basis for believing that there is any tension or inconsistency, much less conflict of rules of law, among the lower federal courts on the subject of the Petition.

III. There Is No Other Reason To Grant Review In This Case

Well over half of the argument in the Petition expressly invites this Court to reconsider the correctness of the lower courts' application of *Thurston* to the particular facts of the present case. Pet. for Cert. at 13-19. For example, petitioner asserts in this Court that "ARCO *specifically* targeted persons in the protected age group for termination" and that ARCO "falsifie[d] both evaluations and trial testimony to justify its actions." *Id.* at 12-13. There is absolutely no support for those assertions. There are no findings or conclusions to support them, and they are contrary to the record. The record shows, for example, that more young people left the plant during the reduction in force than older people and that the population remaining in the department had a high percentage of older people. J.A. 498-99. The Court of Appeals gave careful consideration to the supposed evidence of aggravating factors on which Dreyer actually elected to rely, and reasonably found that none of it was substantial. 801 F.2d at 658-59.

Beyond that, petitioner's factual arguments simply highlight the fundamental flaw in the Petition from the standpoint of this Court's standards: petitioner is attacking a decision of a Court of Appeals that, as to the law, falls well within the scope of this Court's prior holdings and that otherwise turns primarily upon its own particular facts. There is no reason to select this case for review.

CONCLUSION

The Petition for Certiorari should be denied.

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